

Ohio VAP Memorandum of Agreement Track Program

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A. Introduction

U.S. EPA and Ohio EPA have discussed entering into a Superfund Memorandum of Agreement for the Voluntary Action Program "MOA Track" (VAP MOA). The VAP MOA will clarify the roles and responsibilities of U.S. EPA Region V and Ohio EPA with respect to sites addressed under Ohio EPA's proposed MOA Track of the VAP. This document explains Ohio EPA's proposed MOA Track of the VAP. Several addenda are attached to this document, which provide supporting information about Ohio's program.

In summary, the primary differences between the current VAP and the MOA Track of the VAP are that investigation and cleanup activities of MOA Track projects will be overseen directly by OEPA personnel and include opportunities for public review and comment of site documents as they are produced by the volunteer. This is discussed in detail in Section C below.

Ohio EPA proposes to create a two-track system. One track is the "Classic VAP," i.e., the existing Voluntary Action Program. The proposed second track is the new "MOA Track," which expands upon the Classic VAP. More detailed information concerning the Classic VAP process can be found in Appendix E, "Existing Voluntary Action Program Process."

The MOA Track of the VAP is based upon the Classic VAP. The MOA Track requires volunteers to follow the existing procedures for VAP sites and conduct several additional steps. The MOA Track will include more agency involvement, such as notice of entry into the program, approval of certain documents and works plans, and greater public involvement. Sites taken through this track will thus be subject to more administrative review but will be conducting their work under a program that the U.S. EPA has acknowledged, through the MOA, as being an adequate program.

C. The VAP MOA Track

General Concept and Implementation

For the VAP MOA Track, Ohio EPA plans to implement additional steps, to be followed by volunteers, administratively without amendment of current rules or statutes. This program will be called the MOA Track. Volunteers will be able to decide if they want to follow the MOA Track. If they elect to do so, they will be required to follow the existing regulatory and statutory procedures for VAP sites and conduct all the additional MOA Track steps. Volunteers will still be required to utilize a certified professional to prepare the NFA, using the NFA Checklist and Form required by the program rules, and certified laboratories to analyze environmental samples.

Participants in the MOA Track may receive a VAP covenant not to sue, which releases the volunteer from state civil liability to perform additional investigation~~at~~ and remedial activities to address a release of hazardous substances or petroleum that were properly addressed under the NFA, and will have the comfort of knowing that the cleanup is being conducted under a program that the U.S. EPA has reviewed and determined to be adequate.

The process a volunteer will follow under the MOA Track is detailed below.

1. Notice of Entry into the Program

Volunteers electing to pursue the MOA Track will notify Ohio EPA in writing of the intent to participate in the VAP.

2. Notifying the Public of Entry in the MOA Track

The volunteer will publish a notice of their entry into the MOA Track of the VAP in the local newspaper. Each public notice will contain basic information about the property such as the name and location. It will also describe how interested parties can obtain additional information about the property as it proceeds through the investigation and cleanup process.

Ohio EPA will also perform activities that inform the public of a property's entry in the MOA Track. The agency will place the notice developed by the volunteer in the agency's Weekly Review. The Ohio EPA Weekly Review is a weekly publication circulated to a variety of interested parties. It provides information regarding important agency activities as well as public meeting and other public participation notices.

3. Volunteer Conducts Initial Investigation and Submits Report to Ohio EPA

Following notice of entry into the MOA Track, the volunteer will conduct an initial investigation of the site. The initial investigation consists of determining whether or not the site is eligible for participation in the MOA Track. In order to determine eligibility, the volunteer must demonstrate that the property, or any portion of the property, is **not** any of the following:

- Listed on the NPL, proposed to be listed on the NPL (i.e., publication of notice in the Federal Register), or an HRS package has been submitted to EPA Headquarters;
- Subject to cleanup under the Underground Injection Control Program of the Safe Drinking Water Act or ORC Chapters 6111 or 3734. This does not include Class V wells unless they are required to conduct cleanup under an order or a permit;
- Hazardous Substance Storage Tank Systems subject to assessment, removal or remediation under RCRA or ORC Chapter 3737;
- Subject to RCRA Corrective Action via a state or federal permit, order, or agreement (including interim status facilities) as provided in OAC Chapter 3745-55;

- Subject to TSCA requirements for PCB assessment, removal or remediation;
- Subject to federal enforcement or response action under RCRA or CERCLA, including but not limited to administrative or judicial orders, permits, injunctions and consent decrees;
- Subject to hazardous waste closure as defined under ORC Chapter 3734;
- Subject to solid waste closure (i.e., solid waste landfills);
- Subject to Petroleum Underground Storage Tank assessment, removal or remediation under Ohio Revised Code 3737;
- Subject to oil and gas well abandonment; or
- Subject to state enforcement relating to the release or threat of release of hazardous substances or petroleum; or
- Sites which have completed investigation and initiated a remedy under the conventional VAP.

See Ohio Administrative Code rule 3745-300-02 and Ohio Revised Code Section 3746.02 for complete description of eligibility exceptions.

In addition to determining VAP eligibility, the volunteer must complete a Phase I property investigation which complies with the VAP regulations (Ohio Administrative Code 3745-300-06) and prepare a Phase II investigation sampling plan which complies with the VAP sampling requirements (Ohio Administrative Code 3745-300-07). At the completion of this initial investigation, the volunteer will prepare an Eligibility Determination Report, a Phase I Report and a Phase II Sampling Plan and submit these documents to the VAP for review and approval.

4. Agency Review and Approval of Initial Investigation Along with Agency Site Visit

Upon receipt of the volunteer's Eligibility Determination Report, Phase I Report and Phase II Sampling Plan, VAP staff will review each document to determine if the investigations and plans were conducted appropriately and in compliance with VAP statute, rules and guidance.

The VAP reviewer will also conduct a site visit during the review to determine whether site conditions are consistent with the information documented in the reports provided by the volunteer. Other site visits may be conducted later in the site investigation and cleanup process as appropriate.

If deficiencies or inconsistencies are found in any of the above-mentioned reports, the VAP will review and prepare a comment letter indicating what issues the volunteer must address. When all issues are addressed, or no issues are identified in the reports upon initial review, the VAP reviewer will send a letter to the volunteer indicating that the initial investigation is

approved and that the volunteer may proceed with the Phase II investigation.

5. Phase II Conducted and Report Submitted to Agency

Upon receiving initial investigation approval from the VAP, the volunteer will conduct a Phase II investigation for the property. This Phase II investigation must comply with the VAP Phase II rule (Ohio Administrative Code 3745-300-07) which requires that the volunteer assess all potential exposure pathways from identified areas on their property. Identified areas are locations where a release or potential release of hazardous substances or petroleum has or may have occurred. The volunteer must sample all identified areas where exposure pathways to people or the environment are complete or reasonably expected to be complete. As part of the Phase II assessment, the volunteer must also conduct an evaluation of the existing regional geologic, hydrogeologic and physical characteristics and classify the ground water at the site. At the completion of this Phase II investigation, the volunteer will prepare a Phase II Report and submit this document to the VAP for review and approval.

6. Determination that Property Meets Applicable Standards

After the Phase II sampling and analysis is completed, the volunteer must determine whether or not the site meets applicable standards, or cleanup levels which are protective of human health, safety and the environment. The VAP rules contain generic numeric standards for many chemicals of concern for contamination in surface soils, ground waters and surface waters along with procedures (i.e. bioassays and biocriteria testing) for determining if applicable standards for sediment are met. If generic standards or procedures are available for all chemicals of concern on the property, the volunteer may directly determine whether or not applicable standards are met for the site at the conclusion of the Phase II investigation (i.e. step #5 above) without the need for a risk assessment or remedy. These volunteers can move onto NFA submittal (i.e. Step #14 below).

7. Develop Risk Assessment (if necessary) & Submit to Agency

If generic standards or procedures are not available for all chemicals of concern on the property or if, for other reasons the volunteer chooses to conduct a property-specific risk assessment, the risk assessment will be performed after the approval of the Phase II report (i.e. step #5 above). The volunteer must follow the requirements for conducting a risk assessment which are contained in the VAP rules (Ohio Administrative Code 3745-300-09). The risk assessment procedures contained in the VAP rules rely heavily

on procedures and guidance contained in U.S. EPA's Risk Assessment Guidance for Superfund (RAGS) and several other U.S. EPA exposure assessment and exposure factor guidances.

At the completion of the risk assessment, the volunteer will prepare a Risk Assessment Report and submit this document to the VAP for review and approval.

8. Agency Review and Approval of Phase II Investigation

Upon receipt of the volunteer's Phase II Report, VAP staff will review the report to determine if the investigations were conducted appropriately and in compliance with VAP statute, rules and guidance.

If deficiencies or inconsistencies are found in the above-mentioned report, the VAP reviewer will prepare a comment letter indicating what issues the volunteer must address. When all issues are addressed, or no issues are identified in the report upon initial review, the VAP reviewer will send a letter to the volunteer indicating that the Phase II investigation is approved and that the volunteer may proceed with the preparation of the risk assessment (if necessary) or remedial action work plan (if necessary).

9. Agency Review and Approval of Risk Assessment

If a risk assessment was conducted, upon receipt of the volunteer's Risk Assessment Report, VAP staff will review the report to determine if the risk assessment was conducted appropriately and in compliance with VAP statute, rules and guidance.

If deficiencies or inconsistencies are found in the above-mentioned report, the VAP reviewer will prepare a comment letter indicating what issues the volunteer must address. When all issues are addressed, or no issues are identified in the report upon initial review, the VAP reviewer will send a letter to the volunteer indicating that the risk assessment is approved and that the volunteer may proceed with their remedial action work plan (if necessary) or completion of their NFA (if no remediation is necessary).

10. Develop Remedial Action Work Plan (if necessary) - and O&M Plan (if necessary)

Volunteers must develop a remedial action work plan if the property does not directly meet applicable standards, be they generic or risk assessment-derived. This work plan will outline what actions the volunteer will take (i.e. soil removal, treatment system installation, engineering control implementation) to ensure that applicable standards will be met. In addition

to requiring that remedies are protective of public health, safety and the environment, the VAP statute requires that remedial activities be permanent.

If the remedy will result in the standards being met prior to the issuance of the No Further Action Letter, the work plan must describe how the remedy will be implemented and how confirmatory sampling will be conducted after the completion of the remedy. For example, if the volunteer elects to excavate and dispose of contaminated soil, the plan will need to indicate the location and number of samples that will be taken of the area after excavation and will need to identify where the contaminated soil will be properly disposed of.

In addition to describing how the remedy will be implemented, if standards will be met after the remedy has operated for some time, the work plan must also contain an Operation and Maintenance Plan which details how the remedy will be properly maintained and operated until applicable standards are met and how confirmatory sampling will be conducted after the completion of the remedy. This is similar to the O&M concept in Superfund. For example, if ground water will be extracted and treated, the volunteer must document how the pump and treat system will be designed, constructed and operated, the type and frequency of sampling and analysis and the criteria for determining when the system has reached protective standards and can be turned off.

The volunteer will prepare a Remedial Action Work Plan Report, and an O&M Plan if necessary, and submit these documents to the VAP for review and approval. See page 14 for more information about the requirements for O&M.

11. Agency Review and Approval of Remedial Action Work Plan (if necessary) and O&M Plan (if necessary)

Upon receipt of the volunteer's Remedial Action Work Plan Report and O&M Plan (if necessary), VAP staff will review the report to determine if the remedy will comply with VAP statute, rules and guidance. Concurrently, the volunteer will publish notice in the local newspaper indicating that the Proposed Remedial Work Plan is available for public review and comment. The comment period will be for 30 days from the date of the notice. Ohio EPA will consider all public comments received, prior to approving or providing comments on the Remedial Action Work Plan.

If deficiencies or inconsistencies are found, the VAP reviewer will prepare a comment letter indicating what issues the volunteer must address. When all issues are addressed, or no issues are identified in the report upon initial review, the VAP reviewer will send a letter to the volunteer indicating that the

Remedial Action Work Plan Report is approved and that the volunteer may proceed with the implementation of the remedy.

12. Implementation of Remedy

Once the Remedial Action Work Plan is approved by the VAP, the volunteer will implement the remedy. All VAP remedies must be conducted in a manner that complies with all other state and federal environmental laws and rules. VAP remedies are also required to be permanent.

13. Changes to Voluntary Action

It is common for environmental investigations to lead to modifications to original work plans. For instance, a well location may be established in a work plan but need to be relocated due to drill contact with impenetrable material. Or field work may establish that an exposure pathway thought to be incomplete is actually complete. Volunteers must provide Ohio EPA with documentation of any significant changes to the voluntary action, such as significant changes to the sampling plan or risk assessment. VAP staff will review all changes and notify the volunteer in writing whether the changes are acceptable.

14. Documentation of All Investigation and Cleanup Activities - Submittal of No Further Action Letter (NFA)

Once the remedy has been implemented or, in the case of properties which meet applicable standards and require no remedy, the Phase II has been completed, an NFA is prepared. The NFA must be prepared by a certified professional who must review all information pertaining to the voluntary action and determine that the site is protective of human health, safety and the environment. In many cases, the CP will have been involved in conducting the voluntary action from the initial investigation stage. The NFA that is submitted to the VAP will contain all of the investigative and remedial reports mentioned above along with any additional information that is required under the VAP NFA rule (Ohio Administrative Code 3745-300-13). This information includes:

- Legal description of the voluntary property
- Site maps detailing existing topography, latitude and longitude, sampling and monitoring well locations, engineering control locations and use restriction locations
- Ground water classification information

- Identification of all contaminants identified at the property, their sources, if known, and their locations and concentration levels prior to and after any remediation
- Names and qualifications of all individuals who performed work in support of the voluntary action
- List of all documents which were reviewed by the CP in preparing the NFA
- Copies of any deed restrictions or use restrictions for the property
- Any Operation and Maintenance Plan or Agreement developed for the property, including all engineering control plans
- All affidavits prepared in connection with the voluntary action

All of the above information is submitted under affidavit to the VAP to review and determine if the voluntary action has been conducted properly and is protective of human health, safety and the environment.

15. NFA Review

As mentioned above, CPs will still be required to prepare and submit any NFA, including all NFAs in the MOA Track. Ohio EPA will utilize the standard NFA Form and Checklist for sites in the MOA Track as is done for sites in the Classic VAP. This NFA Form was developed by VAP staff to guide CPs through the NFA preparation process and help ensure that their submittals contain all information required by rule. The NFA Form simplifies submittals for certified professionals and helps streamline the review process for VAP technical reviewers.

The review for MOA Track sites will involve ensuring that all work proposed in the earlier documentation was conducted as planned. As with the Classic VAP, once an NFA is submitted, the VAP plans to adhere to the statutory time frames for NFA review.

16. Director Determines if Site is Protective

Once VAP staff complete their technical review of the NFA, a recommendation is made as to whether or not a covenant not to sue should be issued or denied for the property.

If the voluntary action was conducted in compliance with the rules and the site is deemed protective, a recommendation is made by the VAP to the director of Ohio EPA to issue a covenant for the site. The covenant relieves the volunteer of state civil liability to perform additional investigational and remedial activities to address a release of hazardous substances or petroleum that were properly addressed under the site cleanup and covered

by the NFA. The liability protection from the covenant does not cover third party tort actions, releases that occur after the NFA was submitted, releases that were missed or improperly evaluated in the voluntary action, natural resource damages or costs the state incurs as a result of superfund match obligations. See Appendix H for sample covenant language.

If the voluntary action was not conducted in compliance with the rules or it cannot be determined if that the site is protective, a recommendation is made by the VAP to the director of Ohio EPA to deny the request for a covenant not to sue for the site, thus leaving the property open to state action.

Both covenant issuance and denial are final actions of the director and therefore require public notice. This notice contains information about the property and the voluntary action and provides an opportunity to appeal the final action. An individual has the right to appeal any final action within thirty days of the issuance or denial of the covenant if grounds for the appeal are provided to the Environmental Review Appeals Commission (ERAC). ERAC will hear and make decisions on appeals which are filed concerning these actions.

17. Public Participation

Public participation opportunities are available throughout the MOA Track process discussed above. The name and location of the site will be public noticed by the volunteer upon entry into the MOA Track and the notice of entry into the program will be made available for public inspection in the area where the site is located. Notice of the Proposed Remedial Work Plan will be made by the volunteer as well, with 30 days for public review and comment from the date of notice. All documents which are submitted during oversight will be made available for public review in a public repository. If at any time during the MOA Track Process a request for a public meeting is made or Ohio EPA determines that there is significant public interest, a public meeting will be held. The scope of the public meeting will be proportionate to the public interest expressed regarding the site. Ohio EPA will assist with developing the agenda for public meetings and will be present at the meeting to answer any questions and provide any information requested. Additional details concerning the type and scope of public meetings anticipated under the MOA Track is found in the Public Participation section below.

Addressing Projects with Prior Environmental Work

Many brownfield properties have been the subject of environmental studies over time. Interested buyers and sellers conduct phase I and sometimes even phase II

activities, only to decide that they are not yet ready to invest in the entire investigation, cleanup or redevelopment. As a result, today's volunteers often bring projects to Ohio EPA that have had prior studies conducted and are not starting out at the very beginning of site assessment. Ohio EPA believes there are ways to incorporate these types of projects, where people have already taken some steps to address the brownfields problem, into the MOA Track and still have agency oversight and meaningful opportunity for public involvement.

Ohio EPA proposes to allow projects where final remedies have not been implemented the opportunity to participate in the MOA Track. Volunteers will need to notify Ohio EPA of entry into the program and publish the notification. Ohio EPA will conduct the same public outreach and repository activities as are required under the MOA Track. Volunteers at these sites will be required to do any additional work necessary to meet the MOA Track requirements and to send Ohio EPA all the required documents for review and approval (see pages 5-12). It is possible that Ohio EPA, after reviewing the reports from all the VAP work performed prior to entering the MOA Track, might identify the need for additional site work or public meeting activities. In that case, the volunteer will need to conduct the work or hold the meetings before proceeding to the next phase of cleanup. Projects which are into remedy implementation will not be permitted to enter the MOA Track.

Agency Oversight After Cleanup is Conducted

Ohio EPA has the authority to conduct different types of oversight to ensure that voluntary properties have indeed met applicable standards, and that applicable standards are maintained. The different types of oversight mechanisms employed by the VAP are detailed below.

1. Inspection and Audit Authorities

Ohio EPA has broad inspection and audit authorities under the VAP statute. Ohio EPA general inspection and information gathering authorities (ORC sections 3746.18, 3746.19, 3746.20 and 3746.21) permit entry into properties, offices of volunteers, certified professionals' offices and certified laboratories to review information and take samples. Ohio EPA audit authority (ORC Section 3746.17) also permits access to sites, documents and environmental sampling. See pages 16-17 below for more information on audits. ORC Sections 3746.17, 3746.18, 3746.19, 3746.20 and 3746.21 are attached as Appendix I.